Confidentiality and Child Abuse Reporting

written by Richard Leslie | May 24, 2016

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The duty to report child abuse is one of the exceptions to the practitioner's legal and ethical duty of confidentiality. Many situations will arise during the course of a practitioner's career that will present a question of whether or not a child abuse report must be made. Not all questions are easily resolved, and different persons working within the system (e.g., law enforcement, child protective services, mandated reporters) may have different answers or viewpoints. Resolving some of these thorny questions presents ethical and legal considerations, including the duties owed to a client or patient – not only the duty of confidentiality, but more generally, the "duty" to establish the kind of trusting relationship that fosters good treatment. Therapists and counselors are not law enforcement officers. Their primary duty and loyalty is to the patient.

When thorny reporting issues arise, I have sometimes recommended that the mandated reporter, after researching the question to the best of his or ability, call Child Protective Services (or similarly titled governmental entity) and speak with the person who takes the call or, if necessary, his or her supervisor. It is helpful to keep the conversation as general as possible – "I'd like to get your thoughts about a thorny issue that my colleague and I were discussing," or something similar. I have usually counseled therapists about how to lead or influence the person responding to the call to support the conclusion that the therapist has come to (reporting or not reporting) after having sought advice and guidance from reliable colleagues and other sources. If the conclusion of both the practitioner and the county worker is that a report is not required, the risk of later being held liable for a violation of the reporting law can be minimized. Documentation of the telephone conversation, and of the prior research of the question, is of course necessary and wise.

If both agree that a report must be made, the practitioner should have no liability for making the report, even if the reported suspicion of child abuse is later found to be unsubstantiated or unfounded. Most states have immunity from liability laws that protect the therapist or counselor when a report is made, regardless of whether the report is mandated or permitted. A difficult situation occurs where the therapist or counselor believes that the information is not reportable, but was unsuccessful in obtaining agreement from the worker on the phone. If the practitioner is not going to report, those situations will likely require consultation with an attorney who is well-versed in the subject matter. There are times when the desire to keep the information confidential, and the desire not to disrupt the professional relationship and the important work being done, will outweigh the opinion of the social worker who rendered the opinion, despite the liability risk to the therapist. I have experienced numerous circumstances where the social worker (or the law enforcement agency) was simply misinformed, or where there was enough ambiguity in the situation that would make a charge, or an adverse finding of a failure to report, unlikely.

Law enforcement agencies in California are often misinformed as to whether or not a mental health practitioner must report instances where certain acts of unlawful sexual intercourse (statutory rape) occur. An area where ambiguities may arise is general neglect. When does poor parenting cross the line and become general neglect – e.g., the failure of a parent to provide adequate food, clothing, shelter, medical care, or supervision. What about smoking marijuana in a home where a child (for example, a seventeen year old or a two year old) resides – is that always reportable? Driving a motor vehicle with a minor in the car, after the consumption of one or more beers – is that child endangerment and is that always reportable?

What if a patient admits to the possession of a picture or image depicting child pornography? Is that event, when shared with a therapist or counselor, a mandated reporting situation? What if a friend of the patient had downloaded the image and sent it to the patient? Perhaps the client downloaded the material out of curiosity and expressed displeasure and revulsion about what was seen – must a report nevertheless be made? What if the practitioner does not have a reasonable suspicion that the patient is involved with sexual exploitation or that the patient represents a threat to children or anyone else? Does the answer to each question posed above depend upon all of the attending facts and circumstances? A practitioner under one or more of these circumstances might want to opt in favor of confidentiality and the maintenance of the therapeutic relationship in order to, among other things, protect the patient from the often damaging or devastating results of a report. May the practitioner properly opt for maintaining confidentiality?

Each situation is different, and state laws will vary. A “tug of war” may occur when the duty of confidentiality, and the need to establish a trusting relationship between therapist and patient, intersects with certain child abuse reporting statutes. Because laws are sometimes ambiguous and often subject to differing interpretations, practitioners will face these and other thorny situations from time to time. Practitioners should bear in mind that they are not law enforcement officers. They should carefully evaluate the guidance and advice that they may obtain from a worker at Child Protective Services or a law enforcement officer working for a local police or sheriff’s department.